Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF APPELLANTS

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BRIEF OF PETITIONERS

INTRODUCTORY STATEMENT

The Court granted a Writ of Certiorari in this case, on February 19, 1974, to review the decision of the Temporary Emergency Court of Appeals, affirming the injunction issued by the Federal District Court for the Southern District of Ohio, Eastern Division. The opinion of the Temporary Emergency Court of Appeals, affirming the injunction issued by the Federal District Court for the Southern District of Ohio, Eastern Division is included in the Brief of the Petitioners, in the Motion for a Writ of Certiorari.

Jurisdiction of this Court is invoked to review the decision of the Temporary Emergency Court of Appeals, pursuant to Section 211, of the Economic Stabilization Act of 1970, as amended in 1973.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

United States Constitution, Amendment Ten:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

QUESTION PRESENTED

The following question was presented by the Petition for Writ of Certiorari and will be considered in this Brief:

1. Whether the Tenth Amendment of the United States Constitution bars the federal government from controlling the wages and salaries paid to employees of the State of Ohio.

STATEMENT OF THE CASE

On January 10, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill No. 147, providing for certain wage increases to be paid employees of the State of Ohio, the several state universities, and employees of the several county welfare departments. The wage increases in Amended Substitute Senate Bill No. 147, averaged 10.6% for all employees affected by the Bill. Following the enactment of this legislation and its approval by Governor Gilligan, the State of Ohio filed an application with the Pay Board, pursuant to the Economic Stabilization Act of 1970, to pay the increases provided for in this legislation. The Pay Board authorized the various employers to pay the salary increases provided for in Amended Substitute Senate Bill No. 147, beginning March 10, 1972, rather than the effective date of the legislation which was the beginning of the pay period, which included January 1, 1972. The announced reason for the effective date chosen by the Pay Board, was that this would bring the pay increases granted these various public employees to approximately a 5.5% pay increase for the period or periods involved. A Petition for Writ of Mandamus was filed in the Supreme Court of Ohio asking that the Supreme Court of Ohio order the appropriate officials to pay the increased salaries contained in Amended Substitute Senate Bill No. 147, during the period beginning on the first day of the pay period including January 1, 1972, to March 10, 1972. The Supreme Court of Ohio decided that the Writ of Mandamus should be issued. After the mandate was issued, the United States of America filed an action in the Federal District Court for the Southern District of Ohio and obtained an injunction against the appropriate officials from paying the salary increases for the period from

January 1, 1972 to March 10, 1972. The Federal District Court certified that question to the Temporary Emergency Court of Appeals, pursuant to the Economic Stabilization Act of 1970, and the Temporary Emergency Court of Appeals, on October 25, 1973, ordered that the State of Ohio and other public employers be permanently enjoined from paying the pay increases directed to be paid by the Supreme Court of Ohio.

ARGUMENT

Can the Federal Government control what the state pays to its employees pursuant to the Economic Stabilization Act of 1970?

The question stated above is the real question for this Court. If the answer to this question is yes, then the United States will prevail. If the answer to this question is no, then the United States cannot prevail. In the case of *Maryland* v. *Wirtz*, 263 Fed. Supp. 826, a three judge federal court examined at length the question of whether or not the federal government could require the states of the union to pay certain minimum wages. The three-judge court in a two to one decision, decided that the Fair Labor Standards Act Amendments were constitutional. This case was affirmed by a divided Supreme Court of the United States. *Maryland* v. *Wirtz*, 392 U.S. 183. Now we have gone at least one step further. Instead of the United States telling the various states that they must pay the minimum wage to employees, the Temporary Emergency Court of Appeals has told the fifty states that the federal government has the right to control what the fifty states pay to all their employees. This direction would be not only to these employees involved in the lowest brackets who compete with private industry in laundries, in cafeterias, or in custodial posi-

tions, but the state highway patrolmen, traffic signal repairmen, tax investigator agents, prison guards and innumerable other occupations where there is no comparable job in private industry.

The Tenth Amendment of the United States Constitution says:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Bradley* v. *School Board of City of Richmond, Virginia*, 462 F. 2d 1058 at p. 1068, the Court says, "One of the powers thus reserved to the states is the power to structure their internal government." If this statement is true, it is difficult to imagine how any state could structure its internal government without establishing salaries for its employees. In *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 130, 5 L.Ed. 2d 110, this Court said, "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review."

The concurring opinion of Chief Judge Thomsen, in *Maryland* v. *Wirtz, supra.*, is particularly interesting. He states, at page 847:

> "When the thirteen sovereign States adopted the Constitution they gave up only part of their sovereignty to the United States of America. The sytem created by the Constitution was and is a federal system; the States are not administrative divisions of a central government."

Judge Thomsen goes on to state, on page 849:

> "The attempted exercise against a State of the power of the federal government over interstate commerce should face the test: does it interfere unduly with the State's performance of its sovereign and indispensable functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufference of the federal government."

The majority of the District Court in *Maryland* v. *Wirtz, supra.*, concluded that the Fair Labor Standards Act Amendments did not seriously interfere with the indispensable sovereign functions of the various states. This Court in a divided opinion agreed.

The dissent in *Maryland* v. *Wirtz*, 392 U.S. 183 at 205, warns that "the federal government could devour the essentials of the State sovereignty, though that sovereignty is attested by the Tenth Amendment" and this warning was merited by the decision of the Temporary Emergency Court of Appeals below.

In the case of *Coan v. State of California, et al.*,_____ California _____, Case No. 7987, decided by the Supreme Court of California on April 19, 1974, the Supreme Court of the State of California confronted a problem very similar to that presented to the Ohio Supreme Court in this proceeding. The California Supreme Court reached the same result as did the Ohio Supreme Court. In rejecting the decision of the Temporary Emergency Court of Appeals below, the California Supreme Court said:

> "Such conclusion would mean that the federal government has taken over all regulation of state salaries and state prices so that the legislatures of the states could no longer act in the field. The reasoning of the temporary emergency court leading to such preposterous results must be rejected."

The concurring opinion by Judge Mosk is particularly significant when he says:

> "If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capital, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus this could by a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency."

We are not presenting to this Court a hypothetical situation which might occur and asking that this Court prevent a happening which might never occur. Chief Justice Stone in *New York* v. *United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326, said the national government may not "interfere unduly with the State's performance of its sovereign functions of government." Here the federal government has. The Ohio General Assembly in its wisdom established wage rates which it determined were appropriate for state employees to both reward them for service and keep the state competitive with private industry. The federal government has now said that those rates cannot be paid. The federal government is seeking to impose its will on every salary and every wage paid by the State of Ohio.

CONCLUSION

This brief is short and there are few cases cited herein, because we cannot win a contest with counsel for the United States of America, citing all the cases over the last two hundred years concerning the Tenth Amendment to the U.S. Constitution. There is not much left of the Tenth Amendment and if this case is affirmed, and the states can no longer pay their employees what the various legislatures enact, then the Amendment will become almost meaningless. We urge this Court to reverse the decision of the Temporary Emergency Court of Appeals and permit the mandate from the Ohio Supreme Court to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Petitioners has been served upon the Solicitor General of the United States, Robert Bork, by mailing a copy to him at his office, the Department of Justice, Washington, D. C., this 3rd day of ~~April~~ May, 1974.

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